

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RUTH M. MALSTEAD
Claimant

VS.

SCHWAN'S FOOD MANUFACTURING
Respondent

AND

**HARTFORD ACCIDENT & INDEMNITY
CO.**
Insurance Carrier

Docket No. 1,016,362

ORDER

Claimant and respondent and its insurance carrier requested review of the November 15, 2005 Award by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on February 14, 2006.

APPEARANCES

D. Shane Bangerter, of Dodge City, Kansas, appeared for claimant. Mickey W. Mosier, of Salina, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) adopted the rating opinion of Dr. Philip Mills and found that claimant suffered a 6 percent whole body functional impairment as a result of her work-related injuries. The ALJ also ordered respondent to reimburse claimant's counsel in the amount of \$475 for the cost of Dr. Pedro Murati's June 21, 2004

independent medical examination (IME) of claimant, which was being claimed as unauthorized medical. Although the Award expressed the ALJ's concern that claimant attempted to use her unauthorized medical allowance to purchase a rating report, the ALJ found that Dr. Murati's June 21, 2004 report contained treatment recommendations which respondent undertook to follow. The ALJ, however, found that Dr. Murati's rating opinion lacked foundation and did not consider it in finding that claimant had a 6 percent whole body functional impairment.

Respondent and its insurance carrier (respondent) request review of all the ALJ's findings and orders adverse to their positions. Specifically, respondent argues that claimant's functional impairment should be based on the rating of Dr. J. Mark Melhorn, claimant's treating physician. Respondent asserts that because of Dr. Melhorn's position as treating physician, he was better equipped to understand and evaluate claimant's injuries than were Drs. Murati and Mills.

Respondent also argues that the ALJ erred in ordering that it pay \$475 to claimant's attorney in reimbursement for Dr. Murati's examination of claimant. Several months after Dr. Murati examined claimant and issued an IME report, claimant's attorney asked him to assign an impairment rating to claimant. Dr. Murati provided this rating and billed claimant's attorney \$100 for the rating report. He did not re-examine claimant and did not review any subsequent medical records of claimant. Respondent contends this is prohibited by K.S.A. 44-510h(b)(2). In the alternative, respondent requests that Dr. Murati's rating be ruled inadmissible.

Claimant argues the rating of Dr. Murati does not lack foundation and is more credible than those of Drs. Melhorn and Mills because they did not take into account symptoms indicating claimant's diagnosis of bilateral carpal tunnel syndrome and/or bilateral ulnar neuropathy. Accordingly, claimant requests that Dr. Murati's rating of 21 percent impairment to the body as a whole be adopted by the Board in determining her award.

Claimant states that pursuant to K.S.A. 44-510h(b)(2), an employee is entitled to consult a health care provider of his or her choice for the purpose of examination, diagnosis or treatment. The employer is liable for the fees and charges of the health care provider up to \$500. Claimant, therefore, requests that the ALJ's order on this issue be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant started working for respondent on July 29, 2002. Her job was a packer, which involved repetitively using her hands and arms packing pizzas into boxes. On November 23, 2003 she felt a popping in her wrist and later that day felt searing pain over the top of her left hand. She was seen by the company doctor, who sent her to physical therapy. She was placed on light duty and used only her right hand, which caused her to develop right wrist pain.

Claimant was sent to Dr. Melhorn for treatment. Dr. Melhorn, who is a board certified orthopedic surgeon, first saw claimant on February 10, 2004, at which time claimant was complaining of painful right and left hands and wrists. He diagnosed claimant with neuropraxiol. A nerve conduction study was completed by Dr. William Kossow on February 26, 2004. A second nerve conduction study was completed on August 31, 2004, to rule out bilateral carpal tunnel syndrome. Both nerve conduction tests on claimant were interpreted as normal studies. Although claimant had complaints of aching over the palmar aspect of her wrists and on occasion would have symptoms extending into the fingers, Dr. Melhorn was not able to diagnose carpal tunnel syndrome or ulnar neuropathy. However, he also testified that just because a person has normal nerve conduction studies does not mean that he or she does not have carpal tunnel syndrome.

When Dr. Melhorn last saw claimant on September 17, 2004, her symptoms were unchanged. He rated her impairment based on her subjective complaints and opined that she had a 1.5 percent impairment to both the right and left forearms, which he converted to a whole body impairment of 2 percent. This rating was based on the *AMA Guides*.¹

Dr. Murati saw claimant at the request of her attorney on June 12, 2004, for an IME. He diagnosed claimant with early bilateral carpal tunnel syndrome based upon her decreased sensation of the right median distribution, weakness of the bilateral abductors of the thumb, a wrist ratio that would predispose her to carpal tunnel syndrome and a positive carpal compression examination bilaterally. He also believed she had ulnar neuropathy either at the elbow or in the wrist based upon her being weak in the finger abductors, decreased sensation on the left ulnar distribution and a compression examination positive within 15 seconds on the right and immediately on the left. He opined that the bilateral elbow pain was secondary to ulnar neuropathy, which could be ulnar entrapment at the wrists or the elbows or a combination of both. As a result of his examination, Dr. Murati recommended bilateral upper extremity NCS/EMG studies to include sensory and motor examinations across the wrists. He also recommended physical therapy, splinting, anti-inflammatory and pain medications as needed, and cortisone injections.

¹American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Murati issued a letter on October 31, 2004, which rated claimant's impairment. He had not seen claimant since his June 21, 2004 report and had not seen the results of the nerve conduction tests run on claimant on August 31, 2004. He did not think he saw any medical records of claimant generated after his June 21, 2004 examination. Using the *AMA Guides*, Dr. Murati rated claimant as having a 21 percent impairment to the body as a whole.

Dr. Mills, who is board certified in physical medicine and rehabilitation, saw claimant at the request of respondent on May 25, 2005. Dr. Mills reviewed the nerve conduction tests performed in February 2004 and found the results were unremarkable. He performed a physical examination of claimant, focusing on her upper extremities. Range of motion tests on claimant's elbows and wrists were normal. Results of manual muscle testing of the elbows and wrists were normal. Claimant had some subjective complaints of diffuse tenderness in the elbows, forearm and wrists. She also had sensation of light touch decreased in the little and ring fingers bilaterally. Phalen's caused claimant's left little and ring fingers to go to sleep. There was a positive Tinel's at the elbow bilaterally.

Dr. Mills diagnosed claimant with forearm fasciitis, which is pain in the forearm and wrist, a subjective diagnosis. He was unable to determine whether claimant had ulnar nerve irritation but stated that since her nerve conduction study was normal, any ulnar nerve irritation would be minimal. He recommended that claimant avoid repetitious wrist flexion/extension and do task rotation with no repetitive grip or prolonged repetitive acute elbow flexion. Based on the *AMA Guides*, Dr. Mills assigned claimant a 6 percent whole body impairment based on subjective complaints of pain.

After considering the opinions of all three physicians, the Board finds that claimant's permanent partial disability is 6 percent to the body as a whole. In so finding, the Board agrees with the ALJ's conclusion that Dr. Mills' opinion is the most credible and should be adopted. The Board has considered the opinions of Dr. Murati, as well as Dr. Melhorn, and finds both to be credible, but in this instance, they are given less weight than the opinion of Dr. Mills. All three physicians went beyond the objective findings and utilized claimant's subjective complaints in arriving at their conclusions on diagnosis, restrictions and impairment. It appears to the Board that of the three physicians, Dr. Mills struck the most appropriate balance between the subjective and objective evidence in arriving at his impairment rating opinion. Accordingly, the ALJ's award for a 6 percent permanent partial disability is affirmed.

The Board also agrees with and affirms the ALJ's analysis and conclusion to order the cost of Dr. Murati's examination paid as unauthorized medical expense but to exclude

the separate fee charged for his rating report. This bifurcation of fees has become an accepted practice and has been approved by our appellate court.²

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated November 15, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: D. Shane Bangerter, Attorney for Claimant
Mickey W. Mosier, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² *Castro v. IBP, Inc.*, 29 Kan. App. 2d 475, 30 P.3d 1003 (2001); *Carrizales v. Winsteads Restaurants*, No. 90,080, unpublished Court of Appeals decision filed January 23, 2004; *Cowan v. U.S.D. No. 500*, No. 1,000,625, 2004 WL 2093569 (Kan. WCAB Aug. 23, 2004).